# STRIKING A BALANCE BETWEEN PROTECTING CIVIL RIGHTS AND FREE SPEECH ON THE INTERNET: THE FAIR HOUSING ACT VS. THE COMMUNICATIONS DECENCY ACT



## I. INTRODUCTION

On February 3, 2006, a fair housing rights group filed a lawsuit against Craigslist, a social host Web site, for publishing allegedly discriminatory housing ads on the Internet.[1] This lawsuit, for the first time, brings the Fair Housing Act ("FHA") up against the Communications Decency Act of 1996 ("CDA"). The two pieces of federal legislation are distinctly at odds, as one tries to prevent individuals from discriminating in renting and selling property, while the other tries to immunize Web sites from liability for publishing content produced by individual users.

[1] Jim Buckmaster, CEO, Craigslist, *"Fair" Housing Lawsuit Has Been Dismissed*, CRAIGSLIST, http://www.craigslist.org/about/fair.housing.html (last visited Sept. 11, 2007); Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (2006).

The question presented by the lawsuit is whether interactive Web site hosts such as Craigslist may be held liable for content published by their users. Craigslist claims that they can not be held liable for the posts of users based on immunity granted in § 230 of the CDA.[2] Craigslist is a Web site that was created by Craig Newmark in early 1995 as a means of sharing information about local events and activities in the San Francisco area with his friends.[3] Word of the site spread rapidly, and soon users began posting not just about local events, but also about furniture they were selling, job listings, roommate searches, and anything else they needed that an Internet database network could help to find.[4] As the site took off, it expanded to cities than other than San Francisco, domestically as well as internationally. Today, more than 290 U.S. cities have Craigslist Web sites where community members can both search through local listings as well as post them.[5]

A tension exists between the goals of Congressional legislation, such as the Fair Housing Act, designed to protect individuals from unfair discrimination, and the Communications Decency Act, which seeks to promote freedom of the Internet by protecting host Web sites from liability for the posts of their users. When two Congressional acts are at odds with one another, who should determine which trumps? This paper will argue that the judiciary should look to the goals Congress sought to pursue when passing the legislation and use a balancing test to determine what the outcome should be in litigation over conflicting statutes. Specifically, this paper will argue that the CDA should be interpreted so as to grant immunity only to those publishers that make good faith efforts to block ads that would violate the FHA.

Craigslist is a useful tool for Internet users, especially those seeking housing, but the Fair Housing Act is also crucial, hard-won legislation that is critical to protecting minorities and creating diverse communities. The first two parts of this Note will explore the history of both the Fair Housing Act and the Communications Decency Act, which serves to highlight the importance of both pieces of legislation and the reasons behind their enactment. The third part will examine current lawsuits involving the FHA and CDA, concluding that some recent court decisions have interpreted the CDA to grant immunity too broadly, shifting away

---

2 47 U.S.C. § 230 (2006).

3 *What We're About: "A Little History,"* CRAIGSLIST, Mar. 12, 2000, http://craigslist.org/about/mission.and.history.html.

4 *Id.*

5 *Craigslist Home Page*, CRAIGSLIST, http://www.craigslist.org.

from the original Congressional intent behind the legislation, which emphasized good faith blocking and screening efforts. Finally, this Note will argue that the present Craigslist lawsuit, as well as any other Internet fair housing suits, should be decided by taking into account the broader goals of Congress in passing the relevant legislation, as surmised from Congressional Records as well as the text of the statutes. If there is no way to interpret the legislation so as to give effect to both statutes, courts should look to the fundamental goals of Congress in enacting the legislation and elect a solution that promotes those goals. In this case, the solution is that immunity under the CDA should only be granted to those publishers that make good faith efforts to block ads that would violate the FHA.

## II. THE CIVIL RIGHTS ACT OF 1968 (THE FAIR HOUSING ACT)

### A. *History of Segregated Housing in America*

Segregated housing between whites and blacks in the United States can be traced back to the 1800s, from single-race pockets of Northern cities to quartered plantation compounds in the slavery-driven South.[6] The real estate industry's role in discriminatory housing can be traced back to 1913, when the National Association of Real Estate Boards ("NAREB") began teaching members of the organization to work towards preventing race mixing in residential real estate.[7] In 1935, the Federal Housing Administration created a model covenant enforcing race-restriction in certain areas and insisted its builders and subdivision contractors abide by the provision.[8] In 1957, one of NAREB's handbooks listed means of controlling "undesirable influences," which were defined as "bootleggers, gangsters, or a colored man of means who was giving his children a college education and thought they were entitled to live among whites."[9] Because of the violent outbursts that ensued as whites resisted integration and lashed out against newcomers to their neighborhoods, local governments began a standard practice of enacting zoning ordinances creating restrictive covenants against integrated neighborhoods.[10] In the meantime, private citizens made pledges never to sell their homes to African-Americans, relegating blacks

6 STEPHEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 14 (2000).

7 *Id.* at 7

8 *Id.*

9 *Id.*

10 *Id.* at 8.

to housing in segregated ghettoes regardless of income.[11] The battle against race-restrictive covenants was finally won in the courts in the 1948 landmark case of *Shelley v. Kraemer.*[12] However, it was not until twenty years later, when the Civil Rights Act of 1968 (also known as the Fair Housing Act) was passed, that racial discrimination in housing was finally outlawed.[13] Even though the Fair Housing Act championed the law of fair housing, in practice it did not mean that the battle had been won.

When the private agreements and local ordinances designed to keep neighborhoods lily white failed to maintain the status quo of racial segregation, violence inevitably erupted.[14] While the racial strife of the Jim Crow South is a history of common knowledge to most Americans, not everyone knows of the dramatic racial violence that erupted across the Northern cities throughout the twentieth century. From New York City to Cleveland, from Detroit to Denver, from Pittsburgh to Philadelphia, the North saw bloody battles in the name of race-restricted housing.[15] Chicago, the setting for the present lawsuit alleging discriminatory housing on Craigslist, saw some of the worst race-motivated violence in America's history.[16] Local Chicago government had created agreements with both real estate brokers and home owners to keep races separated in housing sales.[17] However, Chicago's black population railed against these restrictions and pressed the boundaries of race, and whites resorted to violence to send a message.[18] Between 1917 and 1921, Chicago whites set off fifty-eight bombs in black neighborhoods and were involved in several ugly riots, one of which lasted thirteen days and resulted in thirty-eight deaths, five hundred and thirty seven injuries, and one thousand people left homeless from the destruction of vast stretches of property in black neighborhoods of Chicago.[19]

### B. *Shelley v. Kraemer*

In 1945, J.D. Shelley, a factory worker who had spent the war helping to manufacture munitions[20] and working construction, and his wife Ethel, a housemaid, scraped together all their savings

---

11 *Id.* at 8.
12 Shelley v. Kraemer, 334 U.S. 1, 23 (1948).
13 42 U.S.C. § 3604 (2006).
14 MEYER, *supra* note 6, at 30.
15 *Id.* at 30-31.
16 *Id.* at 30.
17 *Id.* at 34.
18 *Id.*
19 *Id.* at 34-5.
20 PRICE M. COBBS, M.D., MY AMERICAN LIFE: FROM RAGE TO ENTITLEMENT 68 (2006).

to buy their first home, on Labodie Avenue in St. Louis, Missouri.[21] The Shelleys and their six children had lived with relatives and in rental housing in slums before purchasing the modest two-story masonry residence with its own lawn on a quaint elm-lined street.[22] The neighborhood was a white one, protected by a restrictive covenant forbidding blacks from residing there.[23] The Marcus Avenue Improvement Association filed a lawsuit against the Shelleys for breaking the covenant, and in response local black leaders as well as the NAACP picked up interest in the lawsuit and took up the fight to obtain a court ruling against restrictive covenants once and for all.[24]

The Circuit Court ruled in favor of the Shelleys in 1945, and on appeal the Supreme Court of Missouri reversed the lower court's decision.[25] The African American community in St. Louis rallied around the case and wrote a petition for certiorari to the Supreme Court.[26] The Supreme Court agreed to hear the case along with one covenant case from Detroit and two from Washington, D.C.[27] An unlikely ally to the defendants in the case was President Harry S. Truman, who instructed the Attorney General, Tom C. Clark, to write an amicus brief on the behalf of the defendants for the covenant cases.[28] The brief stated that the situation "cannot be reconciled with the spirit of mutual tolerance and respect for the dignity and rights of the individual which give vitality to our democratic way of life."[29] In January, 1948, when the Supreme Court heard the covenant cases, only six Justices were able to take part in the decision, since three of the Justices owned land on which racial restrictions existed and therefore had conflicts of interest.[30]

In May, 1948, the Supreme Court issued a unanimous 6-0 decision holding that race-restrictive covenants were unconstitutional and in violation of the Equal Protection clause of the Fourteenth Amendment.[31] The real estate industry immediately opposed the ruling, with some local real estate boards

---

21 Wendy Cole, *A House With a Yard*, TIME, May 17, 1948, *available at* http://www.time.com/time/magazine/article/0,9171,798600,00.html; MEYER, *supra* note 6, at 92.

22 *We Shall Overcome: Historic Places of the Civil Rights Movement*, NATIONAL PARK SERVICE, http://www.cr.nps.gov/nr/travel/civilrights/mo1.htm (last visited Sept. 11, 2007); Cole, *supra* note 21.

23 Shelley v. Kraemer, 334 U.S. 1 (1948); MEYER, *supra* note 6, at 92.

24 MEYER, *supra* note 6, at 92.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.* at 93.

29 *Id.*

30 MEYER, *supra* note 6, at 93.

31 Shelley v. Kraemer, 334 U.S. 1 (1948).

campaigning to amend the United States Constitution to legalize race-restrictive covenants.[32] Predictably, after *Shelley*, race-driven violence erupted throughout the United States. In August, 1948, popular music star Nat King Cole purchased an estate in a wealthy Los Angeles neighborhood with his wife and children.[33] The Property Owners Association of the neighborhood expressed prejudice against the wealthy, cultured and sophisticated black singer's presence in their community, and they tried to buy the home back from him at a profit.[34] Cole declined the offer and asserted his rights to move into his home, only to be terrorized by his white neighbors, who planted signs that said "Nigger Heaven" on his property and burned the word "Nigger" into his front lawn.[35]

Chicago, a city notorious for violent hostility towards racial integration and the city in which the Craigslist lawsuit has been filed, experienced persistent violence after the *Shelley* decision as well.[36] Between 1949 and 1951, Chicago experienced "three bombings, ten incidents of arson, eleven incidents of attempted arson, and at least eighty-one other incidents of terrorism and intimidation," according to a NAACP memo.[37] In May, 1951, a college-educated black man who was a former army captain rented an apartment in the all-white Chicago suburb of Cicero.[38] The man, Harvey E. Clark, moved with his wife and two young children because the apartment they had previously rented in a black neighborhood was small and cramped, shared with another family of five, and cost him $56 per month for his family of four to live in one room.[39] Clark was pleased to find better quarters in Cicero, which was closer to his work, and where he was able to find a clean and modern five-room apartment for $60 per month.[40] Unfortunately, the Clarks' luck faded when they were met in Cicero by white protestors who attempted to drive them out by force.[41] Though they won in court when they asserted their legal right to inhabit the apartment, they were terrorized by angry and violent mobs who stormed into the Clarks' apartment and destroyed all of their property, including an $800 piano that Mr. Clark had worked overtime to purchase so that his musically

---

32 MEYER, *supra* note 6, at 94-95.
33 *Id.* at 95.
34 *Id.* at 96.
35 *Id.*
36 *Id.* at 118.
37 *Id.*
38 *Id.* at 92.
39 *Id.*
40 *Id.*
41 *Id.*

inclined daughter could have the opportunity to play the piano.[42] The angry citizens of Cicero firebombed the entire apartment building, destroying it and leaving its white residents as homeless as the Clarks, and forcing the governor to send the National Guard to control the melee.[43] With 450 guardsmen and 200 Chicago police officers working to drive back the mob, it took over four days to end the conflict in the streets of Cicero.[44]

The Cicero riots did not end the violence in the Chicago area. Donald Howard, a war veteran like Harvey Clark, had lived with his wife and children for years in inferior housing with many relatives.[45] They thought they hit a stroke of luck when, in July 1953, they were able to find a nice, clean and new apartment in an all-white Chicago housing project.[46] The official who rented the family the apartment mistook the light-skinned Mrs. Howard for white, but the neighbors were not fooled and began immediately to picket and protest violently outside of the Howards' home, firing pistols, throwing bricks, and setting off bombs at their apartment, as well as attacking black passerby.[47]

These anecdotes demonstrate that, despite the ruling in *Shelley v. Kraemer*, which rendered discriminatory restrictive covenants technically unlawful, citizens were not deterred from trying to take the law into their own hands. A Supreme Court ruling amounts to nothing if that decision is not enforced by authorities. The NAACP worked hard throughout the 1950s to develop new strategies to fight against residential segregation and effectively enact change.[48] One tactic was for committees to locate housing opportunities for blacks outside of traditionally segregated ghettoes, and then "[c]ontact the renters or realtors to investigate the details concerning price and type of accommodation and then pass that information on to members seeking housing."[49] That data was then compared to any transactions that occurred and any activity denying housing based on race or color, and the information was made available to show proof about the availability of housing for minorities.[50] However, much more work was needed to champion the fair housing cause and eradicate discrimination in the housing market.

---

42 *Id.* at 118-19.
43 *Id.* at 119
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.* at 119-20
48 *Id.* at 143
49 *Id.*
50 *Id.*

### C. *Enaction*

In 1949, Congress passed The Housing Act of 1949, asserting as its aim "a decent home . . . for every American family," and pledging funds towards low-cost housing.[51] While a step in the right direction, this piece of legislation did not effectively put an end to discriminatory housing practices. In November, 1962, President Kennedy signed Executive Order 11063 on Equal Opportunity Housing.[52] This Executive Order's directive was for government housing agencies "to take all action necessary and appropriate to prevent discrimination in the sale or rental of property owned or operated by the federal government, provided with the aid of federal loans or grants, or provided by loans insured by the federal government."[53] The Executive Order reached housing touched by federal regulation and federal funds, but did not control private housing situations. It was also executed solely by the President, and did not have the backing of Congress. Improvements would be needed before the legislative battle for fair housing could be deemed a success.

After 1962, the NAACP and other groups continued to lobby Congress to enact legislation to improve housing opportunities for the black community.[54] They also fought for President Johnson to "expand the coverage and improve the enforcement of Executive Order 11063."[55] The Johnson administration declined to expand the Executive Order, but rather called for Congress to enact fair housing legislation.[56] Beginning in 1966, various fair housing bills struggled in Congress, facing filibusters and constant revision and amendment.[57] By late March 1968, members of the House of Representatives were still obstructing the bill, but an event of national attention swayed the mood of the country when on April 4, 1968, Dr. Martin Luther King, Jr., was assassinated.[58] King's assassination led to riots across the nation, causing many Americans to fear an all-out race war, and supporters of the fair housing bill used the national event to convince the House that the time was ripe to pass this legislation.[59] Exactly one week after

---

51 Exec. Order No. 11,063, 27 C.F.R. 11527 (1959-1975), *reprinted in* 42 U.S.C. § 3608 (1982); MEYER, *supra* note 6, at 152.

52 MEYER, *supra* note 6, at 169.

53 *Id.*

54 *Id.* at 204.

55 *Id.* at 205.

56 *Id.*

57 *Id.* at 205-06.

58 Earl Caldwell, *Martin Luther King is Slain in Memphis*, N.Y. TIMES, Apr. 4, 1968, *available at* http://www.nytimes.com/learning/general/onthisday/big/0404.html#article; MEYER, *supra* note 6, at 208.

59 MEYER, *supra* note 6, at 208.

the assassination of Dr. King, President Lyndon B. Johnson signed the first federal fair-housing law, The Civil Rights Act of 1968, officially "marking the end of governmental support for residential segregation."[60]

Only one month after the Fair Housing Act was adopted into law, the Supreme Court added to the scope of federal fair housing protection in the case of *Jones v. Mayer*.[61] The ruling in *Jones* expanded the status of fair housing beyond the enactments of Congress, insisting on the elimination of all forms of discrimination, "including those perpetrated by private individuals," based on the Civil Rights Act of 1866.[62] While the Civil Rights Act of 1968 was not to become effective until 1970, the ruling in *Jones* took effect immediately, and left *no exceptions* to fair housing protection.[63] This eliminated even the "Mrs. Murphy" exemption for dwellings with four or fewer units, where the owner lives in one of the units, as well as other exemptions.[64] With the Fair Housing Act and the *Jones* decision in effect, the battle for desegregation of residential areas had finally been won in both Congress and the Courts. The only barrier now in place was the racism and prejudice persistent in the hearts and minds of American citizens.

### D. *Scope of Protection*

The Fair Housing Act makes it illegal to discriminate on grounds of "[r]ace, color, religion, sex, or national origin."[65] The Act forbids, among other things, discrimination by means of making false representations about the availability of housing for rent or sale; inducing a property owner to rent or sell housing because minorities may move into a neighborhood ("blockbusting"); directing racial, ethnic or religious groups into areas where those groups are already concentrated ("steering"); and *making any advertisement for the sale or rental of housing that indicates a preference, limitation or discrimination* based on race, color, religion, sex, or national origin.[66] This last provision is most applicable to the allegations of discriminatory advertising practices in the Craigslist lawsuit. The prohibitions of the Fair Housing Act apply to all housing across the United States; both public and

60 42 USC §§ 3601-3604, 3613 (2006).
61 Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)
62 MEYER, *supra* note 6, at 209.
63 *Jones*, 392 U.S. at 409.
64 *What Housing is Covered?*, FAIR HOUSING LAWS, http://www.fhcsp.com/Laws/ (last visited Sept. 11, 2007); MEYER, *supra note* 6, at 209.
65 CHARLES LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS 46 (2005).
66 42 USC § 3604 (2006).

private; and urban, suburban, and rural.[67]

### E. *Why is Integrated Housing So Important?*

Because of the many restrictive covenants in place prior to 1948, blacks were living in conditions of squalor, hemmed into neighborhoods of high density with deplorable living conditions, forced to pay higher rents for housing of poor quality.[68] The effects of racially segregated housing continue to echo to this day. For example, in a present-day Chicago housing project, there are few businesses or services within the poor, overcrowded black community, with inferior schools and frequent gang violence.[69] The apartments there are nothing more than "[d]ark, dank cave[s]," with "cinder block walls," rusted kitchen cabinets, a bathtub hot-water faucet that does not turn off, and a heating system with broken controls."[70] Resident LaJoe Rivers and her three children place furniture near windows to prevent stray bullets from injuring them, and the kids know to run into the hallway and duck down to the floor when the common sounds of gunfire erupt.[71] Blacks and other minorities should not be forced to live in ghettoes because barriers prevent them from finding housing in safer neighborhoods, even when they can financially afford to live in them.

Aside from the opportunity to obtain clean and safe housing for reasonable prices, there are inherent advantages to living in a diverse and multi-ethnic neighborhood. Psychological and sociological studies show that discriminatory laws increase prejudice.[72] Psychologist Kenneth B. Clark performed studies in the late 1930s and early 1940s where he asked black children to choose between a black doll and a white doll for a series of questions.[73] When asked to choose the doll they liked best, the nicest doll, or the prettiest doll, the black children invariably pointed to the white doll.[74] When asked to choose the doll "[t]hat looks bad," the black children picked the black doll.[75] These results were the same for the majority of African-American children tested in cities across the United States, demonstrating

---

67 *Id.*; LAMB, *supra* note 65, at 47 (emphasis added).

68 HOUSING DESEGREGATION AND FEDERAL POLICY 23 (John M. Goering ed., 1986).

69 MARA S. SIDNEY, UNFAIR HOUSING: HOW NATIONAL POLICY SHAPES COMMUNITY ACTION 1 (2003).

70 *Id.*

71 *Id.*

72 MEYER, *supra* note 6, at 135.

73 *Id.*

74 *Id.*

75 *Id.*

the stigma they felt from segregation and other prevalent forms of racism.[76] In the context of education, the Supreme Court recognized that "[t]o separate [children] . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[77] The Supreme Court noted that the effect of segregation is heightened when sanctioned by law, because "the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group . . . . Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children . . . ."[78] The Supreme Court's observations in the context of education are equally applicable to the context of housing.

Integrated living is essential to breaking down stereotypes and prejudices, both for the stigmatized minorities and for the prejudiced groups. Only through exposure and education will come acceptance and peace. Furthermore, it is integral to basic human rights and the equality guaranteed under the 14th Amendment of the United States Constitution that citizens of all colors and creeds be afforded the same opportunity for affordable, safe and clean housing. As influential psychologist Kenneth B. Clark wrote, "[o]nly human beings who lack respect for self and others could permit slums and ghettoes to exist when they are correctable . . . ."[79]

### F. *Enforcement*

Though, in a legal sense, the battle for fair housing was won years ago with the Civil Rights Act of 1968, in reality, the legislation itself failed to integrate neighborhoods. Communities have persistently resisted integration, and despite the many laws in place in the name of fair housing, discrimination is still a reality. In the United States today, over a third of African Americans live in 90% African American neighborhoods.[80]

A legal method by which civil rights groups can assess and determine whether the Fair Housing Act is being complied with is by sending in "testers" to inquire about renting or purchasing a

---

76 *Id.*

77 Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

78 *Id.* (quoting Belton v. Gebhart, 87 A.2d 862 (1952)).

79 KENNETH B. CLARK, PATHOS OF POWER, Harper & Row, (June 1974) .

80 Lois M. Quinn & John Pawasarat, *Racial Integration in Urban America: A Block Level Analysis of African American and White Housing Patterns*, EMPLOYMENT AND TRAINING INSTITUTE, UNIVERSITY OF WISCONSIN-MILWAUKEE, January, 2003, http://www.uwm.edu/Dept/ETI/integration/integration.pdf.

home or apartment, and then assessing whether undercover "testers" of different races receive disparate treatment. Sending in "testers" is a way to prove that individuals are not complying with the requirements of the Fair Housing Act, even if they are trying to cloak the fact that they are engaging in discriminatory practices. For example, one white "tester" visited an attractive Denver home for rent in an affluent neighborhood.[81] While discussing the terms of the rental, a black woman walked up the path to the front door, and the white real estate agent whispered not to discuss the terms of the rental with that individual.[82] The "tester" lingered in the back of the house while the realtor showed the house to the black woman, who received a substantively different sales pitch than the white customer.[83] The real estate agent stressed that detailed employment and income history would be required of the black customer, and then refused to provide an application to her when she requested one.[84] Later, the white "tester" was told it would be a simple procedure to rent the house, that no background checks of income or employment history would be required, and that no application was necessary.[85] This incident is evidence of modern day housing discrimination, in clear violation of the FHA. However, it is simply not feasible for "testers" to monitor every rental or sale of real estate across the United States. Other pieces of legislation and vigilant practices are key to assuring fair housing opportunities across America.

The Civil Rights Act of 1968 by no means marked the end of legislative efforts towards promoting and enforcing fair housing in America. In 1977, Congress enacted the Community Reinvestment Act ("CRA"), as Title VIII of the 1977 Housing and Community Development Act, to create urban development programs.[86] In 1979, the Supreme Court held that the city of Bellwood, Illinois, had the right under Title VIII to sue realtors who were steering black home seekers towards an already integrated part of the town, while steering white home seekers away from the mixed area.[87] These practices were alleged to affect the racial composition of the neighborhoods and to have the effect of phasing out an already integrated neighborhood into a segregated one.[88] The Court noted that these practices could

81 SIDNEY, *supra* note 69, at ix
82 *Id.*
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.* at 38.
87 Gladstone, Realtors v. Bellwood, 441 U.S. 91 (1979).
88 *Id.* at 111; HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 68, at 50.

reduce the number of customers for homes in Bellwood, causing the value of property there to plummet, and inducing a phenomenon known as "white flight."[89]

In the 1980s, still working towards effective integration of residential housing, Congressman and the Department of Housing and Urban Development ("HUD") secretary Jack Kemp developed the Homeownership and Opportunity for People Everywhere ("HOPE") program to "[e]xpand homeownership and affordable housing opportunities to help low-income families achieve self-sufficiency," specifically for minority Americans.[90] Various civil rights and fair housing groups lobbied toward the passage of the 1988 Fair Housing Amendments Acts, which, once passed, created a process for enforcing violations of the Fair Housing Act of 1968.[91]

Under President Bill Clinton, HUD continued its efforts toward desegregation in residential areas through Moving to Opportunity ("MTO"), with the strategy of "ensuring that people are not trapped and isolated in predominantly poor neighborhoods for lack of options."[92] President Clinton created the President's Fair Housing Council in January, 1994, by executive order, forming an inter-agency body to affirmatively promote fair housing and regularly address fair housing problems.[93] President Clinton continued his efforts towards fair housing throughout his presidency, but the legacy of segregation in suburban housing persisted.[94]

In spite of the persistent legacy of segregation, what was once a heated movement during the Civil Rights era of the 1960s has died down, as blacks, whites, and other ethnic and racial groups settle into a self-segregation that they hardly question. In 1999, a Denver city official said "I couldn't get fifteen people out here to demonstrate for fair housing," despite the fact that Denver has little racial integration within its communities.[95] The complacency of Americans does not, however, mean that invidious discrimination in housing opportunities should be allowed to persist. Even if no one is protesting in the streets, the aforementioned fair housing legislation is enacted law. If no one enforces these laws, the inherent benefits of living in diverse neighborhoods will never be fully realized, and the process of

89 *Gladstone*, 441 U.S. at 111.
90 LAMB, *supra* note 65, at 189.
91 SIDNEY, *supra* note 69, at 53.
92 LAMB, *supra* note 65, at 193.
93 *Id.* at 197.
94 *Id.* at 197-98.
95 SIDNEY, *supra* note 69, at 115.

overcoming prejudices will be stifled.

## III. THE COMMUNICATIONS DECENCY ACT OF 1996

### A. *The Internet*

In 1969, the government's Advanced Research Project Agency ("ARPA") embarked on an experimental project to link computers for use in defense-related military research.[96] The successful network expanded to universities, companies, and eventually individuals, becoming what today is known as the Internet. The Internet is "the physical infrastructure of the online world: the servers, the computers, fiber-optic cables and routers through which data is shared online."[97] It is a distinct entity from the World Wide Web ("WWW" or "Web"), which is the collection of data and "documents containing text, visual images, audio clips and other information media that is accessed through the Internet."[98] Each document has a unique Universal Resource Locator ("URL") that "identifies its location in the Internet's infrastructure," so that server computers are able store the data from the Web and make it available via the Internet.[99] The Internet, lauded as a "unique and wholly new medium of worldwide human communication," is not tangible or physical in nature but rather is "[a] giant network which interconnects innumerable smaller groups of linked computer networks."[100] In 1996, the usage of the Internet was estimated at 40 million users worldwide.[101] In 1999, the estimate had increased to more than 109 million users in over 159 countries.[102] In 2001, a survey announced the number of Internet users worldwide to be 513.41 million.[103]

### B. *The First Amendment*

Free speech is often lauded as an American ideal, known for its protection in the First Amendment to the United States Constitution.[104] Freedom of expression has long been acclaimed for its ability to inspire controversial debate, permit expression of

96 MADELEINE SCHACHTER, LAW OF INTERNET SPEECH 17 (2d ed., Carolina Academic Press 2002).
97 *In re* Doubleclick Inc. Privacy Litig., 154 F.Supp. 2d 497, 501 (S.D.N.Y 2001).
98 *Id.*
99 *Id.*
100 ACLU v. Reno, 929 F.Supp. 824, 830 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1997).
101 SCHACHTER, *supra* note 96, at 15.
102 *Id.*
103 *Id.* at 16.
104 U.S. CONST. amend. I.

radical opinions, and allow new intelligence to emerge through a free marketplace of ideas. Through freedom of speech and expression, new ideologies can flourish or shrivel, and knowledge and truth are difficult to suppress. Justice Brennan described the First Amendment as the embodiment of the national commitment to the notion that "debate on public issues should be uninhibited, robust, and wide-open."[105] However, the United States Constitution does not afford unlimited protection to speech and expression, and categories of speech such as hate speech and obscenity may still be subject to government suppression.[106]

The Internet is a medium through which regulation of speech may be nearly impossible to achieve, even if the result would be desirable. Practical and technological difficulties make cyberspace a difficult universe to police. Because there is no "centralized distribution point on the network, it is much harder to stifle independent information sources."[107] The nature of the Internet itself makes mass communication exponentially more effective than before the technology existed, and makes it so that "[a]ny person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."[108] The sheer number of World Wide Web pages, chat rooms, e-mail "list servs,"[109] message boards and other forms of interactive communication provide unprecedented ability to exercise free speech of unlimited scope.

Judge Frank Easterbrook once addressed a conference on the "Law of Cyberspace" and announced that "there was no more a 'Law of Cyberspace' than there was a 'Law of the Horse.'"[110] Yet, despite the amorphous nature of cyberspace and the seeming impossibility of policing it, cyberlaw has become a legitimate field of law, and governments have indeed attempted to regulate its uses.[111] Existing laws, such as criminal law, intellectual property law, defamation and libel law, and obscenity law, all apply to the Internet just as they could to any other outlet (assuming, of course, that the perpetrator can be identified if his Internet acts were anonymous).[112] Further, governments have attempted to

---

105 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

106 *See* Virginia v. Black, 538 U.S. 343 (2003); Miller v. California, 126 S. Ct. 803 (2005).

107 Jerry Berman & Daniel Weitzner, *Abundance and User Control: Reviewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1624 (1995).

108 Reno v. ACLU, 521 U.S. 844, 870 (1997).

109 The word "listserv" is often used as a generic term for any email-based mailing list application. *See generally* http://en.wikipedia.org/wiki/LISTSERV.

110 Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV 501 (1999) (referencing Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207).

111 *See, e.g.*, 47 U.S.C. § 230 (2006) ("The Communications Decency Act of 1996").

112 See Part III D, *Disclosure of Internet User Identity, infra* pages 30-31, discussing the

pass cyberlaw-specific regulations prohibiting certain behaviors via the Internet.[113] These regulators have clashed with proponents of "freedom of the Internet" who believe that deregulation is the only way to keep the Internet a medium where information can flow uninhibited.[114] A response to Professor Lawrence Lessig's rebuttal of Judge Easterbrook's "Law of the Horse" argument takes the viewpoint that cyberspace "can best be protected by allowing the widest possible scope for uncoordinated and uncoerced individual choice among different values and among different embodiments of those values."[115]

### C. *The Communications Decency Act of 1996*

Despite anti-regulatory sentiments circulating in the public sphere, the United States government attempted to step in and police cyberspace. The Internet took off at a rapid clip in the early 1990s, and the legislature was left struggling to catch up, as a new medium rife with pornography and obscenity was unleashed on the world. The Telecommunications Act of 1996 was passed in response to various rapidly emerging technologies, and Title V of this Act, known as the Communications Decency Act of 1996, was a direct response to the obscenity problem posed by the Internet.[116]

The American Civil Liberties Union ("ACLU") filed suit immediately after the Communications Decency Act was passed, alleging that several specific provisions of the CDA abridged the freedom of speech protected by the First Amendment.[117] In *Reno v. ACLU,* the Supreme Court struck down several provisions of the CDA as void for vagueness due to its chilling effect on free speech under the First Amendment. Because the CDA "effectively suppresses a large amount of speech that adults have a constitutional right to receive," the Act posed an unacceptable

difficulties in identifying anonymous Internet users.

113 For an interesting example of a foreign government's attempt to police the internet, see *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme,* 169 F.Supp. 2d 1181, 1184 (N.D. Cal. 2001), where the French government attempted to ban the sale of Nazi memorabilia to its citizens via the Yahoo! Auction site. The French court examined mechanisms for use in blocking content from Web sites originating in the United States to implement the technology possible to block the access of its citizens to Yahoo! auctions. *See* MADELEINE SCHACHTER, *supra* note 96, at 163-66.

114 *See, e.g.*, The Electronic Frontier Foundation, http://www.eff.org/br/ (an organization devoted to protecting free speech on the Internet).

115 David G. Post, *What Larry Doesn't Get: Code, Law, and Liberty in Cyberspace,* 52 STAN. L. REV 1439, 1440 (2000).

116 104 P.L. No. 104, 110 Stat. 56.

117 MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 272 (1998). "On February 8, 1996, within minutes of the president's signing the Telecommunications Reform Act into law, [ACLU lawyers] were... filing the lawsuit that would be known as *ACLU v. Reno.*" *Id.*

burden on free speech due to the availability of less restrictive alternatives to achieve the purpose of protecting minors from obscenity.[118] The *Reno* decision struck down some specific provisions of the CDA, but others remained intact. The most relevant provision of the CDA to this lawsuit is § 230, discussed *infra*, which remains alive today.[119]

In 1995, prior to the passage of the Telecommunications Act of 1996 (which includes the CDA in its Title V), the New York Supreme Court held that an Internet Service Provider's (ISP) position as "an on-line service that exercised editorial control over the content of messages posted on its computer bulletin boards" rendered it a "publisher" of its content.[120] In *Stratton Oakmont v. Prodigy*, the New York Supreme Court held defendant Prodigy liable for statements posted on its message boards that were written by independent users of the site. The court's ruling that Prodigy was a "publisher" of the content rendered it liable for the offensive material, likening the ISP to a newspaper.[121] The court noted that Prodigy's policy of policing its message boards for offensive content constituted editorial control.[122]

Congress immediately reacted to *Stratton Oakmont*, and as a result passed § 230 of the CDA as part of the Telecommunications Act of 1996.[123] The focus of § 230 is alleviation of the burden that ISPs would shoulder if held accountable for third party conduct. Prior to the passage of the Communications Decency Act, two competing bills circulated in Congress—the Exon-Coats proposal in the Senate, and the Cox-Wyden proposal in the House of Representatives. In 1994, Senator James Exon watched an NBC News program, *Dateline*, about online pedophiles, and was so disturbed by the phenomenon that he introduced a bill to regulate the Internet and protect children.[124] Senator Exon's first version of the bill, proposed in 1994, would have subjected the Internet to the control of the Federal Communications Commission ("FCC"), which polices radio and television programming, and it would have effectively outlawed any "indecency" on the Internet whatsoever.[125] Senator Exon described the Exon-Coats approach with regard to host liability:

---

118 Reno v. ACLU, 521 U.S. 844 (1997).

119 47 U.S.C. § 230 (2006).

120 Stratton Oakmont, Inc. v. Prodigy Serv. Co., No. 31063-94, 1995 WL 343710, (N.Y. Sup. May 24, 1995).

121 *Id.*

122 *Id.*

123 SCHACHTER, *supra* note 96, at 281.

124 JEREMY HARRIS LIPSCHULTZ, FREE EXPRESSION IN THE AGE OF THE INTERNET: SOCIAL AND LEGAL BOUNDARIES 23 (2000).

125 GODWIN, *supra* note 117, at 264-65.

> [P]arents have responsibilities, but so do on-line service providers, and publishers and so does law enforcement. If you operate an on-line adult pornographic book store, movie house or swap meet, you have the burden to assure that children do not enter, and that you are not trading in illegal obscenity. Those engaging in pornography and indecency should install electronic "bouncers" at their electronic doorways.[126]

Specifically, the Exon-Coats proposal *would* hold web site publishers responsible for the content of their users. Later amendments to the bill created "affirmative defenses" for good faith efforts to restrict access to prohibited materials.[127] Senator Exon explained the defenses and exemptions as follows:

> Defense (f)(1) explicitly exempts a person who merely provides access to or connection with a network like the Internet for the act of providing such access. Understanding that providing access or connection to online services is an action which can include other incidental acts, this legislation is intended to exempt from prosecution the provision of access including transmission, downloading, storage, and certain navigational functions which are incidental to providing access or connection to a network like the Internet. An online service that is providing its customers with a gateway to networks like the Internet or the worldwide web over which it has no control is generally not aware of the contents of the communications which are being made on these networks, and therefore it should not be responsible for those communications. To the extent that service providers are doing more than merely providing access to a facility or network over which they have no control, the exemption would no longer apply. For instance, if an access provider were to create a menu to assist its customers in finding the pornographic areas of the network, then that access provider would be doing more than solely providing access to the network. Further, this exemption clearly does not apply where the service provider is owned or controlled by or is in conspiracy with a pornographer who is making communications in violation of this legislation.[128]

Under this description of the bill, Craigslist is doing more than providing access, because Craigslist creates menus and forums in which individual users can do many things, including rent and sell housing. Through reading dialogue within the Senate, the intent of Senators Exon and Coats with regard to overturning the result in *Stratton Oakmont* is apparent.[129]

---

126 141 CONG. REC. S 8310, S8344 (1995).
127 GODWIN, *supra* note 117, at 266.
128 141 CONG. REC. S8310, S8344 (1995).
129 *Id.*

Particularly with regards to subsection (f)(4), the Senators clarified that service providers and Web site hosts may assert editorial control by removing objectionable material *without* being liable for suits as a publisher of that material.[130] Senator Coats also clarified that system operators were free to discontinue service to customers who post objectionable material without being liable for breach of contract.[131] Although the Congressional intent was to overturn the *Stratton Oakmont* ruling so that service providers would not be held liable as publishers of the material merely for exerting editorial control over it, their intention as evinced from the Congressional record was *not* for service providers to cease exercising any control over objectionable user content. Rather, it was to encourage hosts to exercise editorial control and to feel free to remove objectionable content without fear of being considered a "publisher" and held liable for the content, as under *Stratton Oakmont.*

The Exon-Coats measure passed in the Senate with an 84 to 16 majority, but came up against opposition in the House.[132] Representatives Cox and Wyden proposed § 230 as an amendment that would specifically overrule *Stratton Oakmont* and immunize host Web sites from liability for content published by their users.[133] Congress debated the merits of the provision, and comments made during the arguments illuminate the sentiment of the legislature with respect to their intent in passing the bill.

Representative Cox, of California, explained what he thought his proposed amendment would accomplish:

> First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, *let us say, who takes steps to screen indecency and offensive material for their customers.* It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem.[134]

At the crux of the proposal was the idea that service providers who exercise editorial control *to protect users from offensive content* will be free from liability. Representative Cox's proposal intended to encourage hosts to help *police* their sites from problematic material without fearing repercussions. Representative Goodlatte of Virginia, arguing against the Senate's Exon-Coats proposal and

---

130 *Id.*

131 *Id.*

132 141 CONG. REC. S9770, S9775 (daily ed. Jul. 12, 1995) (statement of Sen. Exon).

133 141 CONG. REC. H8468-70 (daily ed. Aug. 4, 1995) (statements of Rep. Cox and Rep. Wyden).

134 141 CONG. REC. H8460, H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (emphasis added).

for Cox-Wyden, stated:

> There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong.[135]

Ultimately, this approach prevailed, and § 230 of the Communications Decency Act of 1996, as passed into law, provides, in part, that:

> § 230. Protection for private *blocking and screening* of offensive material
>
> (c) Protection for "Good Samaritan" *blocking and screening* of offensive material.
>
> (1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) *any action voluntarily taken in good faith to restrict access to or availability of material* that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) *any action taken* to enable or make available to information content providers or others the technical means to *restrict access to material* described in paragraph (1) [subparagraph (A)].
>
> ***
>
> (e) Effect on other laws.
>
> (1) No effect on criminal law. Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this Act [*47 USCS § 223* or *231*], chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of *title 18, United States Code [18* USCS §§ 1460 et seq. or §§ 2251 et seq.], or any other Federal criminal statute.
>
> (2) No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining

[135] 141 CONG. REC. H8460, H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte).

> to intellectual property.
>
> (3) State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.
>
> (4) No effect on communications privacy law. Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.[136]

The result of § 230 of the CDA is that tort liability for Internet activities is limited to individuals committing the torts and cannot be extended to the Web sites publishing the content. The CDA provision being argued by Craigslist in its litigation is that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[137] *Stratton Oakmont* is overruled in section 2(c), which specifies that Web sites exercising editorial judgments may not be considered publishers *so long as they have Good Samaritan blocking and screening protocols in place.*[138] These provisions are intended to promote Internet self-regulation and eliminate fears of Web site publishers that they will incur liability for their actions.[139] One cannot ignore the fact that the heading of section 2(c) is "Protection for 'Good Samaritan' *blocking and screening* of offensive material,"[140] and therefore the provisions that follow apply to those Web sites who are exercising such good faith efforts.

Section 230 of the CDA has been lauded for its protection of freedom of the Internet. In declining to encumber electronic communications with government interventions, this legislation effectively killed hundreds of thousands of potential lawsuits against Web site hosts.[141] The policy underlying the Act does not ignore principles of free speech and notions that the Internet should be an unhindered medium for free expression.[142] The Act has been rationalized on the basis that the Internet should have "no gatekeepers—no publishers or editors controlling the

136 47 U.S.C.S. § 230 (2006) (emphasis added).
137 47 U.S.C. § 230(c)(1) (2006).
138 *Id.* at § 230(c)(2).
139 SCHACHTER, *supra* note 96, at 282.
140 47 U.S.C. § 230(c)(2) (emphasis added).
141 SCHACHTER, *supra* note 96, at 282.
142 *Id.*

distribution of information."[143]

Predictably, it was not long before § 230 was challenged in the courts, namely in *Zeran v. America Online Inc.*[144] The United States Court of Appeals for the Fourth Circuit affirmed judgment for AOL, upholding the constitutionality of § 230 of the CDA.[145] The court noted the practical ramifications echoed in House debates by Representative Goodlatte, stating "[t]he amount of information communicated via interactive computer services is . . . staggering . . . . It would be impossible for service providers to screen each of their millions of postings for possible problems."[146] An in-house attorney at America Online explained:

The pragmatic ramifications of holding such providers accountable for allegedly libelous statements they did not originate likely would have a profound effect on Internet access and usage; in such circumstances, providers would have little alternative other than to curtail the quantity and scope of matter transmitted over its facilities. Accordingly, on-line service providers who do not create the content in issue are accommodated by the statutory immunity, which helps promote extensive and robust electronic communication.[147]

The *Zeran* court explained that "Congress enacted § 230's broad immunity to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material . . . . In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."[148] After *Reno,* government interest in creating an "Internet rating system," as well as using filtering software, piqued, and in 1997 President Clinton "convened a summit about the Internet at which proposals for filtering mechanisms and Internet content ratings were discussed."[149] President Clinton and Vice President Gore announced that they thought filtering and blocking programs were a better way to protect minors from inappropriate content than content regulations like those imposed by the CDA.[150] While

143 *Id.* at 282-83 (quoting Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World,* 28 CONN. L. REV 1137, 1141 (1996)).

144 Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997), *cert. denied,* 524 U.S. 937 (1998)..

145 *Id.* at 327.

146 *Id.* at 333.

147 SCHACHTER, *supra* note 96, at 282.

148 *Zeran,* 129 F.3d at 327.

149 JAE-YOUNG KIM, SORTING OUT DEREGULATION: PROTECTING FREE SPEECH AND INTERNET ACCESS IN THE UNITED STATES, GERMANY AND JAPAN 111 (2002).

150 *Id.*

the ability of parents to monitor and control the content accessible to their children is not contested, "freedom of the Internet" proponents are against the implementation of filtering technologies that can be set in place without the user's awareness.[151] Filtering technologies are critiqued because, if implemented by private entities, they could "evade the constitutional scrutiny that otherwise would be extended to governmental efforts to censor."[152] Whether or not the government has the power to compel Web sites to employ filtering is subject to open debate.[153]

The CDA defines an information content provider as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet."[154] However, the issue of determining who qualifies as an information content provider is not always clear-cut.[155] Since *Zeran*, courts have upheld protections under § 230 of the CDA, even expanding its applications to insulating ISPs from liability for profiting from sales of bootleg recordings and allowing transmission of information that was harmful to minors.[156] In 2006, reaffirming § 230, the United States District Court for the Eastern District of Pennsylvania, in *Dimeo v. Max*, announced:

> [A]bsent federal statutory protection, interactive computer services would essentially have two choices: (1) employ an army of highly trained monitors to patrol (in real time) each chatroom, message board, and blog to screen any message that one could label defamatory, or (2) simply avoid such a massive headache and shut down these fora. Either option would profoundly chill Internet speech.[157]

While Congress's intent with respect to § 230 was certainly to encourage good faith blocking and screening, and not to mandate it, the language of section 2(c) could be read to mean that only those Web hosts employing these methods would receive immunity from liability. However, the line of cases following *Zeran* has expanded the protection of § 230, so that even those Web sites that do not make good faith blocking and screening efforts will receive its protections.

---

151 SCHACHTER, *supra* note 96, at 250.

152 *Id.*

153 *Id.*

154 47 U.S.C. § 230(f)(3) (2006).

155 SCHACHTER, *supra* note 96, at 299.

156 *Id.* at 306-07 (citing Stoner v. eBay, Inc., No. 305666, 56 U.S.P.Q.2d, 2000 WL 1705637 (Cal. Super. Ct. Nov 1, 2000)) (finding profits from sale of bootleg sound recordings not actionable against ISP); Doe v. Am. Online, Inc., 783 So. 2d 1010 (Fla. 2001) (holding transmission of information harmful to minors not actionable against ISP).

157 Dimeo v. Max, 433 F. Supp. 2d 523, 529 (E.D. Pa. 2006).

### D. *Disclosure of Internet User Identity*

One of the challenges faced in light of § 230 of the CDA is determining what individual user is liable for criminal or civil action. Because the Internet allows users to post anonymously, and § 230 purports to shield host Web sites from liability for publishing content of users, an injured party may be left not knowing whom to sue. Seeking compulsory disclosure of a defendant's identity requires setting out a prima facie case, which is a high threshold that results in additional litigation to disclose the individual's identity.[158] In such instances, potential plaintiffs might be deterred from filing lawsuits given the increased costs and the seeming impossibility of identifying the faceless Internet offender. *Dendrite International, Inc. v. John Does 1-14* is a 2001 case that examines the standards to be applied by courts to evaluate discovery applications to identify anonymous posters on message boards of ISPs.[159] The *Dendrite* court enunciated a balancing test where, once the plaintiff has made out a prima facie case, "[t]he court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."[160] This exacting standard makes suing an anonymous defendant a cumbersome task.

In the context of fair housing, individuals who find individual user violations of the Fair Housing Act on Web sites such as Craigslist would have to go through the burdensome task of affirmatively identifying the individuals who posted the questionable ads, which may have been posted anonymously, and then filing suit against each individual. This would be expensive, time consuming, and beyond the reasonable means of most parties, even if they were legitimately denied housing opportunities because of these advertisements. Alternatively, if Web sites such as Craigslist maintained a degree of control in preventing the publication of FHA-violative housing ads, offenders could be prevented from seeking their discriminatory housing preferences on such major Internet databases.[161]

---

158 SCHACHTER, *supra* note 96, at 316-17.

159 Dendrite International, Inc., v. John Doe, 342 N.J. Super. 134, 775 A.2d 756 (N.J. 2001).

160 *Id.*

161 This would prevent them from publishing FHA-violative ads in prolific databases such as Craigslist, but would not chill their free speech rights, since they are still free to maintain a personal Web site expressing their views.

## IV. CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS, INC. V. CRAIGSLIST, INC.

The Chicago Lawyers' Committee for Civil Rights Under Law ("CLC") filed a lawsuit against Craigslist on February 3, 2006, in the United States District Court for the Northern District of Illinois, Eastern Division, for publishing 100 allegedly discriminatory housing ads on chicago.craigslist.org.[162] Plaintiff is a Chicago non-profit organization, created for the purpose of promoting and protecting civil rights. In the realm of fair housing, the CLC aims to eradicate discriminatory housing practices by:

> (1) educating people about their rights under the fair housing and lending laws; (2) investigating complaints of fair housing discrimination; (3) providing referral information for non-discrimination housing matters; (4) advocating on a wide range of housing related issues, such as public housing, increased affordable housing, and fair and equal mortgage lending opportunities; and (5) providing free legal services to individuals and groups who wish to exercise their fair housing rights and secure equal housing opportunities.[163]

This lawsuit was brought against Craigslist for publications made in violation of the federal Fair Housing Act, that indicate a preference for sale or rental of dwellings based on race, color, religion, sex, familial status, or national origin.[164]

A sampling of the discriminatory ads in question include: A July 6, 2005 rental advertisement stating "African Americans and Arabians tend to clash with me so that won't work out;" a January 12, 2006 rental advertisement stating "NO MINORITIES;" a July 13, 2005 post stating the rental requirement of "Clean Godly Christian Male;" an August 17, 2005 request for a "Christian single straight female;" and a July 29, 2005 housing advertisement that states "Non-Women of Color NEED NOT APPLY."[165]

Other than frustrating its mission towards achieving fair housing, the CLC alleges that defendant's publication of discriminatory advertisements on Craigslist

> undermines . . . CLC's educational efforts because the

---

[162] Buckmaster, *supra* note 1; Chicago Lawyers' Committee for Civil Rights, Inc. v. Craigslist, Inc., 461 F.Supp. 2d 681 (N.D.Ill. 2006).

[163] Complaint at 2, Chicago Lawyers' Committee for Civil Rights, Inc. v. Craigslist, Inc., 461 F.Supp. 2d 681 (N.D.Ill. 2006) (No. 06-0657), *available at* http://www.clccrul.org/templates/UserFiles/Documents/craigslistcomplaint.pdf [hereinafter Complaint].

[164] 42 U.S.C. § 3604(c) (2006).

[165] Complaint, *supra note* 164, at 6.

> advertisements misinform home-seekers as to what is and is not illegal. Defendant's publication of discriminatory housing advertisements on its website may have the effect of sanctioning and normalizing discrimination in the sale or rental of housing because the public becomes accustomed to seeing such illegal advertisements.[166]

Plaintiff also alleges that defendant's activities hinder the CLC's efforts because landlord contact information can be made anonymous via privacy features enabled by Craigslist.[167] This makes it difficult, if not impossible, for either the CLC or any individual to contact prospective tenants and landlords either to bring individual lawsuits, or to "educate the prospective tenants and landlords whose advertisements are published by Defendant."[168]

Craigslist CEO Jim Buckmaster said, "[t]his [CLC] lawsuit ignores the essential nature of Craigslist, demanding that we cease treating our users with trust and respect, and instead impose inappropriate, mistake-prone, and generally counter-productive centralized controls."[169] Buckmaster alleges that putting into effect the requested controls, "would vastly reduce the number of legitimate non-discriminatory ads that the site could process."[170] In fact, Craigslist alleges that some implications of a decision in the plaintiffs' favor would be violations of user privacy rights which would actually contravene First Amendment rights by inhibiting their free speech.[171] Buckmaster's statement notes what he sees as an irony, in that the success of the lawsuit would be "[s]ignificantly reducing access to equal opportunity housing, by undercutting our fundamental free speech rights, and by intruding on important privacy rights."[172]

It is Craigslist's policy not to monitor postings on the site whatsoever.[173] However, there is a "democratic" system in place whereby users who find ads offensive can "flag" them electronically.[174] If enough users to constitute a critical mass agree that a post is offensive, it will immediately be electronically removed.[175] As opposed to exercising editorial control, like American Online and Prodigy did in *Stratton Oakmont* and *Zeran*,

---

166 *Id.*
167 *Id.*
168 *Id.*
169 Buckmaster, *supra* note 1.
170 *Id.*
171 *Id.*
172 *Id.*
173 Brian N. Larson, *HUD Studies Web Sites' Role in Fair Housing Compliance*, STEWART, http://www.stewart.com/news.jsp?newsId=25411 (last visited Sept. 11, 2007).
174 *Id.*
175 *Id.*

Craigslist uses this automated system to govern which content is removed from their Web site. However, under § 230 of the CDA they would be permitted to exercise editorial control over removing FHA-violative postings without facing liability. It is merely Craigslist's decision not to take these actions to remove offensive postings.

Plaintiff asks for numerous types of relief, some of which seem easier to implement and less intrusive than others. For example, Craigslist could be required to implement a non-discrimination policy, which it could advertise on its Web site, notifying all users of the site that submissions "are subject to federal fair housing laws" and stating that submissions to the Web pages must "abide by applicable fair housing laws, and . . . set forth examples of prohibited language."[176] Additionally, plaintiff requests that Craigslist post a statement of its non-discrimination policy and the requirements of applicable fair housing laws on its Web sites.

Though these and similar prayers for relief do not seem likely to significantly trample freedom of the Internet goals, other requests by plaintiffs do seem to raise problems. Requiring Craigslist "[t]o report to the U.S. Department of Housing and Urban Development and Plaintiff CLC any individual or entity seeking to post a discriminatory housing advertisement on its website," for example, raises considerable issues of Internet privacy.[177] Additional requests, such as requiring "Defendant to implement screening software to preclude discriminatory advertisements from being published on Defendant's Web site," would clearly intrude with freedom of the Internet and freedom of speech.[178] These requirements would be costly to implement and could possibly open the floodgates to restrictions in numerous other areas of Internet user posting. Perhaps most outrageously, plaintiff CLC requests that, in the future, defendant *employ* CLC and pay them to monitor its Web site to ensure compliance with the relief granted and the fair housing laws.[179]

Defendants also argue that finding Craigslist liable would create a slippery slope, leading to regulation "for every form of potentially regulated content and, indeed, for all content as to

176 Complaint, *supra* note 164, at 21.

177 *Id.* Note that, though posting notices of non-discrimination policies on Craigslist.org does not seem to require any cost or effort to implement or significantly hinder freedom of internet goals, it would involve a court forcing Craigslist, a private company, to implement a particular policy at the direction of the judiciary.

178 Complaint, *supra* note 164, at 22.

179 *Id.*

which liability might be imposed."[180] Plaintiffs counter that the slippery slope would be one of stripping away civil rights protections in the realm of fair housing. As the Internet becomes a more popular and prevalent way of seeking employment, housing, and other services, discrimination could run rampant if Web sites were not held liable for such activity if they did not attempt to police it.[181] Plaintiffs suggest one creative solution that would not involve any manual monitoring of posts, but rather would electronically notify individuals *posting* housing advertisements that their activity may be in violation of fair housing laws.[182] However, Craigslist objects to any Court-imposed requirement as an impediment to freedom of the Internet.[183]

On November 14, 2006, the first phase of *CLC v. Craigslist* concluded when Judge Amy St. Eves, of the United States District Court for the Northern District of Illinois, Eastern Division, ruled in favor of Craigslist.[184] Judge St. Eves carefully articulated the standards of construction that she applied, explaining that the court "must first look to the language of the statute and assume that its plain meaning accurately expresses the legislative purpose."[185] She cites authority that dictates to "look first to the text for an answer. We look beyond the express language of a statute only where such language is ambiguous, or where a literal interpretation would lead to absurd results or thwart the goals of the statutory scheme."[186] Using these canons of construction, the Court finds that § 230(c)(1) "does not bar 'any cause of action,' as *Zeran* holds and as Craigslist contends, but instead is more limited—it bars those causes of action that would require treating an ICS as a publisher of third-party content."[187] The Court finds *Zeran's* absolute immunity to be overbroad, and criticizes

180 Brief for Amazon.com, Inc. et al. as Amici Curiae Supporting Defendant at 11, Chicago Lawyers' Committee for Civil Rights, Inc. v. Craigslist, Inc., 461 F.Supp. 2d 681 (N.D.Ill. 2006) (No. 06-0657), *available at* http://www.clccrul.org/templates/UserFiles/Documents/CLCCRULvcraigslistAmicus.pdf [hereinafter Amicus Brief].

181 Surreply Brief for Plaintiff, *Craigslist*, 461 F. Supp. 2d 681, (No. 06-0657) *available at* http://www.clccrul.org/templates/UserFiles/Documents/CLCCRULvcraigslistSurreply.pdf [hereinafter Reply Brief].

182 The contemplated solution would involve a spam filter that recognized trigger words and phrases such as "no kids" and "minorities." When users attempted to post such ads, a message would pop up notifying them that proceeding with their post may make them liable for violations of fair housing laws. If the writer of the message chose to continue with the post, they would still have the freedom to do so, thereby preserving the freedom of the internet urged by defendants. *See id.* at 10 n.7.

183 Reply Brief, *supra* note 182, at 11.

184 *Craigslist*, 461 F. Supp. 2d 681.

185 *Id.* at 693.

186 *Id.* (internal citations omitted).

187 *Id.* ICS is an Interactive Computer Service. *See* 47 U.S.C.S. § 230(f) (2006).

subsequent courts for latching onto *Zeran's* limitless immunity.[188] Further, the Court finds inconsistencies within *Zeran,* and cites conflicts with the statutory language of the CDA.[189] Setting aside previous precedent and embarking upon a fresh interpretation of the CDA, Judge St. Eves writes that "Congress did not intend to grant a vast, limitless immunity, but rather enacted Section 230(c) specifically to overrule the court decision in *Stratton Oakmont.*"[190] Citing favorably the Seventh Circuit's decision in *Doe v. GTE,* which in dicta called *Zeran* into question, the Court states that "it seems rather unlikely that, in enacting the CDA and in trying to protect Good Samaritans from filtering offensive conduct, Congress would have intended a broad grant of immunity for ICSs that do [sic] *not* screen any third-party content whatsoever."[191] Although the Court departs from broad readings of § 230(c) immunity such as *Zeran's* and various subsequent decisions, it still finds that in the instant suit the CLC's case fails on the pleadings.[192] The Court concludes that "because to hold Craigslist liable . . . would be to treat Craigslist as if it were the publisher ofthird-party content, the plain language of Section 230(c)(1) forecloses CLC's cause of action."[193] Though this ruling is a positive step because it departs from *Zeran*'s limitless immunity, it still applies § 230(c)(1) without a strict requirement that § 230(c)'s protection for blocking and screening is a component.

The CLC has since filed a Motion to Reconsider in which it asserts that the FHA should be interpreted liberally to effectuate its purposes, and asks the Court to reconsider is ruling that any claim with publication as an element is barred.[194] In support of its claim, the CLC cites the Conference Committee Report, which states, "[o]ne of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions *which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.*"[195] The CLC argues that this means "Congress did not

188 *Craigslist,* 461 F. Supp. 2d at 694-95.

189 *Id* at 693-95.

190 *Id.* at 696-97.

191 *Id* at 697 (internal citations omitted).

192 *Id* at 698.

193 *Id.*; *See also* 47 U.S.C. § 230(e) (excluding certain laws from Section 230's scope, but not excluding the FHA); Andrus v. Glover Const. Co., 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent").

194 Plaintiff's Motion to Alter or Amend Judgment, *Craigslist,* 461 F. Supp. 2d 681, (No. 06-0657) *available at* http://www.clccrul.org/templates/UserFiles/Documents/CLCCRULvcraigslist-reconsider.pdf [hereinafter Motion to Amend].

195 *Id.*; H.R. REP. NO. 104-458, at 194 (1996).

intend to bar every claim as to which publication is an element, but rather to preclude imposition of liability on a provider of interactive computer services ("ICS") because it screened third-party content."[196] The summation of the CLC's latest motion is that "Congress itself addressed what it meant by its prohibition on "[t]reatment of publisher or speaker" and said that it wished to ensure that no court would treat an ICS as a publisher just because that ICS *had* screened third-party content. This case would not treat Craigslist as a publisher because Craigslist screened third-party content. CLC argues that Craigslist *failed* to screen out the discriminatory third-party content and is therefore not entitled to § 230(c) protection for good faith screening."[197]

Judge St. Eves' recent decision is influential because *Zeran* is a precedent that reads § 230 expansively and that many courts have followed, and this ruling calls *Zeran* into question. The Court cites Seventh Circuit authority that instructs the judiciary to employ textualist interpretation when two federal statutes are at odds.[198] However, this Note argues that, unless Congress has specifically indicated which of two statutes should prevail in the event of a conflict, the judiciary should interpret and apply them in the way that best preserves the purpose of both and promotes harmony between them. In the event that both cannot be applied, the fundamental purposes underlying the pieces of legislation should dictate the outcome. This proposed approach is broader than that taken by the Court in *CLC v. Craigslist,* as well as that taken by the United States Court for the Central District of California in *Roommates.com,* which relies on the maxim "expressio unius est exclusio alterius."[199]

## V. CONCLUSION

Under the proposed approach, courts could attempt to harmonize the two pieces of legislation by construing the CDA to require a good faith effort on the part of the Web site host to implement screening and filtering mechanisms. This is well within the plausible and likely intention of the legislature with

196 Motion to Alter or Amend, *supra* note 196, at 2.

197 *Id.*

198 *Craigslist,* 461 F. Supp. 2d at 692-93.

199 Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, No. 03-09386, 2004 U.S. Dist. LEXIS 27987, at *6-12 (C.D. Cal. Sept. 30, 2004). The Court here relies on the maxim "expressio unius est exclusio alterius," that "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Id.* at *8 (internal citations omitted).

respect to the heading of § 230(c), which affords the protections listed in its subheadings to those hosts who make Good Samaritan blocking and screening efforts. With this interpretation enunciated, courts could take individual cases on their facts to determine whether the challenged Web site has met this standard and qualified for immunity. Although Congress certainly intended to promote freedom of the Internet in enacting the CDA, that same body, at an earlier time, sought to curtail the pervasive problem of housing discrimination in passing the FHA. By limiting the interpretation of the CDA to immunizing only those host Web sites that make a good faith blocking and screening process, the practice of discriminatory housing practices will be curbed without significantly trampling on the freedom of users to post housing requests. The fact that a user who posts an ad seeking to rent an apartment to "Whites only," for example, might have that post removed by screening software, does not mean that the same user is not free to open his own Web site devoted to "White power." Free speech is not curtailed—only the invidious discrimination in housing advertising that is specifically prohibited by the Fair Housing Act.

Congress used the terms "protection for blocking and screening" seven times in the rather brief § 230 of the CDA.[200] This notion was at the heart of the legislation—that immunity was intended for those Web site hosts who made some good faith effort to curb malicious practices. By immunizing even those Web site hosts who made *no* blocking and screening efforts, many hard won civil rights protections would be rolled back, if not destroyed, since individuals could rampantly discriminate without fear of detection or liability. There would be nothing to prevent discrimination in real estate as well as employment or education, and the purposes of the FHA would be frustrated. Craigslist argues that it is not feasible for it to implement blocking and screening software, since it has "6 million new free classified ads each month, and a staff of 18."[201] However, due to technological innovation that permits automated solutions, limitations on staff size do not preclude the simplest measures of blocking and screening. As suggested by the CLC, an automated computer program could filter for phrases such as "minority," and a computer could automatically interrupt with a pop-up message when such terms are typed into post listings, notifying the potential publisher that his post may violate the FHA and suggesting to the user, "please rewrite your ad to make it clear that

200 47 U.S.C.S. § 230 (2006.)
201 Larson, *supra* note 173.

you will accept tenants without regard to race, gender, family status, religion, and national origin."[202] Such a measure would be technologically simple to implement without being cost-prohibitive, and would constitute a good-faith screening effort sufficient to satisfy the host Web site for immunity from liability under the CDA. Furthermore, it would promote the goal of educating the public about fair housing laws.

This Note urges that the CDA be interpreted so as to protect from liability *only* those Web site hosts who make some sort of good faith screening and blocking effort against violations of the FHA. Without screening and blocking efforts in force, no protection should be afforded to a Web site host that allows civil rights violations to run rampant. As the Internet outmodes newspapers and other forms of mass communication, it is likely to become the most common means of seeking housing, not to mention employment and other services. Unless the Internet is subject to regulation that aligns its use with the civil rights laws of the United States, much important and hard-won federal legislation will cease to be effective.

*Rachel Kurth**

[202] Reply Brief, *supra* note 182, at 10 (providing details on this illuminating suggestion for a simple and effective means of preventing discriminatory housing ads on a site such as Craigslist).

* Senior Notes Editor, Cardozo Arts & Entertainment Law Journal; J.D. Candidate, 2008, Benjamin N. Cardozo School of Law; B.A., 2005, University of Pennsylvania. My sincere thanks and gratitude to Professor Susan Crawford for her guidance and commentary, to the Arts and Entertainment Law Journal's editorial board for their contributions towards the publication of my Note, and to my family and friends for their love and support. 